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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LYNNE DALE WATERLOO,

Defendant and Appellant.

2d Crim. No. B182741
(Super. Ct. No. 2004017399)
(Ventura County)

Lynne Dale Waterloo appeals from the judgment entered after a jury convicted him of assault with a deadly weapon (ADW; Pen. Code, § 245, subd. (a)(1)¹ and two counts of making criminal threats (§ 422) with special findings that he personally used a knife to threaten one of the victims (§ 12022, subd. (b)(1)). In the second phase of trial, the trial court found that appellant had suffered three prior strike convictions (§§ 667, subds. (b)-(1); 1170.12, subds. (a)-(d)) and three prior felony convictions within the meaning of section 667, subdivision (a)(1).

The trial court imposed a Three Strikes sentence of 25 years to life (§§ 667, subd. (e)(2); 1170.12, subds. (b) & (c)(2)), a one-year weapon enhancement (§ 12022, subd. (b)(1)), and three consecutive five-year felony conviction enhancements (§ 667, subd. (a)(1)). The total aggregate sentence was 41 years to life. We strike one of the

¹ All statutory references are to the Penal Code unless otherwise stated.

five-year enhancements, reduce the sentence to 36 years to life, and affirm the judgment as modified.

Facts and Procedural History

On the evening of April 2, 2004, Jennifer M. saw Kraig Scott at a liquor store and invited him to her house. When Scott arrived, appellant was already there. Scott grew up with appellant and asked what he was doing there. Appellant said that he "had been licking [Jennifer's] pussy for a week."

Scott was troubled by the remark and told Jennifer. Jennifer confronted appellant and yelled, "What the fuck are you talking about?" Angry, appellant lunged at Scott with a four inch knife. Appellant pinned Scott against a patio fence and said, "I'm going to fucking kill you." When Jennifer tried to intervene, appellant pointed the knife at her and said, "Shut the fuck up, bitch. I'm coming after you next." Scott ran and called 911. He told the operator that appellant was in the house with a knife and had threatened to kill everybody.

Jennifer went inside to call for help. Appellant chased her around the kitchen, grabbed the phone and threw it on the ground. Appellant said that she "had one week to get off the beach or he would slit [her] throat from ear to ear."

Appellant fled before the police arrived. Fearing for their safety, Scott and Jennifer stayed at a motel that night.

On April 14, 2004, appellant called Jennifer at work. Jennifer said the police were looking for him and that he was facing two felony charges. Appellant warned Jennifer that he would have his "homeboys" take care of things if she testified against him. Appellant said that he had stabbed dozens of people and did not remember half their names. Jennifer was scared and cried. Her boss, Margaret Reyes, heard part of the phone conversation.

At trial, appellant denied threatening anyone, denied brandishing a knife, and denied calling Jennifer. Appellant stated that Scott was drunk and jealous that he was sleeping with Jennifer. Appellant was supposed to keep it a secret. Appellant testified that Jennifer slapped him and screamed, "You fuck -- fucking asshole, come in

my house and tell [Scott] you're screwing me." He claimed that Scott and Jennifer made up the whole story to get back at him.

After the jury returned guilty verdicts on the ADW and criminal threats counts, appellant moved for new trial. The trial court found that the verdict was supported by the evidence and that Jennifer and Scott "were completely freaked out about Mr. Waterloo and his actions that night."

Gang Membership

Appellant argues that the trial court erred in permitting the prosecutor to cross-examine him about gangs. Before trial, counsel were instructed not to bring up gangs. After Jennifer testified that appellant threatened to have his "homeboys" take care of things, appellant took the stand.

Defense counsel asked what "homeboy" meant and asked "Are you a member of a gang?" Appellant replied: "Never been in a gang in my life. I've been in a surf club. Never been in a gang in my life." Appellant stated that "homeboy" means "[m]y buddy, my homeboy, somebody I grew up with."

The prosecutor argued that appellant had opened the door about gangs. The court agreed and stated that "there's nothing I can do about that. He flat [out] said he didn't belong to one, and if you have evidence that he did, then that's just the way it goes. . . ."

On cross-examination, appellant was asked if he belonged to a gang and whether his tattoos were gang logos. Appellant stated that the "OX" tattoo on his arms referred to a punk rock band and that the "Silver Strand" tattoo across his stomach referred to the beach where he surfed.

Appellant argues that the cross-examination was improper because the gang evidence was not relevant. That was the basis for the trial court's in limine order.

Appellant, however, interjected the issue. When appellant testified that he has "[n]ever been in a gang in my life," he opened the door to further inquiry concerning past and present gang affiliation. (See e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1147.) The trial court did not abuse its discretion in permitting the prosecution to cross-

examine appellant about gangs. (*People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Sakaris* (2000) 22 Cal.4th 596, 644.)

"When a defendant voluntarily testifies, the district attorney may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them. [Citation.] A defendant cannot . . . limit the cross-examination to the precise facts concerning which he testifies. [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 771, 822.)

Appellant's assertion that he was denied effective assistance of trial counsel is without merit. It was appellant's decision to testify. (*People v. Lucas* (1995) 12 Cal.4th 415, 444.) Counsel, as a matter of trial tactics, may have decided to ask what "homeboy" meant so the jury would not speculate about gangs. A reviewing court will not second-guess trial counsel's reasonable tactical decisions. (*People v. Milner* (1988) 45 Cal.3d 227, 238.) Even " 'debatable trial tactics' " do not " 'constitute a deprivation of effective assistance of counsel.' [Citations.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 928.)

Appellant argues that the prosecutor's questions were leading and insinuated gang membership. The jury, however, was instructed that the statements and questions of counsel are not evidence. (CALJIC 1.02.) It is presumed that the jury understood and followed the instructions. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1115.) This is reflected in the verdicts. Appellant made the "homeboy" remark when he called Jennifer at work on April 14, 2004. He was charged with dissuading a witness from testifying (count 4; § 136.1, subd. (a)(1)), on which the jury returned a hung verdict.

We conclude that the questions about gangs and tattoos were harmless. (See e.g., *People v. Champion*, *supra*, 9 Cal.4th at pp. 923-924; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.) The evidence clearly showed that appellant assaulted Scott with a knife and made death threats. This was established by Scott's and Jennifer's testimony, the taped 911 call, and the testimony of the officer who responded to the 911

call. But for counsel's purported errors, it is not reasonably probable that appellant would have received a more favorable verdict. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 698].) To prevail on a claim of ineffective assistance of counsel, appellant must prove "prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]" (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

Prior Violent Acts

Appellant contends that the trial court erred in admitting evidence of prior violent acts to show specific intent to make the criminal threats. (Evid. Code, § 1101, subd. (b); see *People v. Kipp* (1998) 18 Cal.4th 349, 369.) "In order to establish a section 422 violation, the prosecution must establish (1) that the defendant had the specific intent that his statement would be taken as a threat (whether or not he actually intended to carry the threat out), and (2) that the victim was in a state of 'sustained fear.' The prosecution must additionally show that the nature of the threat, both on 'its face and under the circumstances in which it is made,' was such as to convey to the victim an immediate prospect of execution of the threat and to render the victim's fear reasonable." (*People v. Garrett* (1994) 30 Cal.App.4th 962, 966-967.)

Scott testified that he knew appellant had committed violent crimes, that appellant told him about prior acts of violence, and that appellant was known to carry a knife and to have stabbed people. Scott believed appellant would carry out the death threats because appellant had once beat up a friend and put him in the hospital.

Jennifer also feared for her life. Appellant told her that he had committed violent crimes and had stabbed dozens of people including a girlfriend.

The trial court gave a limiting instruction.²

² The jury was instructed: "Over the course of the last two witnesses, evidence has been introduced for the purpose of showing that the Defendant committed a crime or crimes other than that for which he is on trial. . . . [T]his evidence, if believed, may not be considered by you to prove that the Defendant is a person of bad character or that he has a disposition to commit crimes. [¶] It may be considered by you only for the limited

With respect to the criminal threats counts, the prior crimes evidence was admissible to show specific intent and to show that Scott and Jennifer were in a state of sustained fear. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156; *People v. Garrett*, *supra*, 30 Cal.App.4th at p. 967.) Jennifer's and Scott's knowledge of appellant's criminal past "was admitted not for the purpose of showing appellant's disposition to commit the charged offense but, rather, for the purpose of establishing crucial elements of that offense. Thus, Evidence Code section 1101 posed no bar to the admission of the evidence." (*Id.*, at pp. 967-968.)

Appellant acknowledges that the evidence was admissible to establish the victims' sustained fear but argues that it was not admissible on the issue of intent. In *People v. Garrett*, *supra*, the defendant phoned his wife and said, "I'm coming home to put a bullet in your head." (*Id.*, at p. 965.) Evidence of prior violence was received to show defendant's intent and the victim's/wife's sustained fear. (*Id.*, at p. 967.) The evidence was probative because defendant could have claimed the death threat was intended to be a joke.

Unlike *Garrett*, the death threats were made during a violent, physical confrontation. Appellant argues that his conduct was so violent, that no one disputes his intent to make a criminal threat. Appellant therefore claims that evidence of prior violent acts was unnecessary and cumulative. (Evid. Code, § 352.)

We reject the argument because appellant's plea of not guilty put into issue all of the elements of the charged offense, including intent. (*People v. Linenauger* (1995) 32 Cal.App.4th 1603, 1610.) The manner in which appellant threatened the victims also raised the inference that he may not have intended the statements to be genuine threats. Appellant laughed when he told Jennifer that he would slit her throat from ear to ear. Jennifer testified, "It was like a mockery. The tone of his voice was kind of, 'Heh,' you

purpose of determining if it tends to show the existence of the intent which is a necessary element of the crime charged."

know, 'like I'd really hurt you' kind of thing. . . . It was almost like knocking me for being scared."

Appellant acted strangely when he threatened Scott. Scott testified that appellant looked right through him, it "didn't seem like . . . anyone was there." Scott tried to reason with appellant and said, "What are you doing? It's me. It's Kraig." Appellant told Jennifer, "I wasn't going to hurt him. I just wanted to scare him."

The trial court did not abuse its discretion in concluding that the probative value of the prior crimes evidence substantially outweighed its prejudicial effect. (Evid. Code, § 352; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) The jury was instructed that the prior violent acts could be considered to show specific intent and that "[y]ou are not permitted to consider such evidence for any other purpose." (CALJIC 2.50.)³

Appellant complains that the instruction was too narrow because the prior crimes evidence also established the victims' sustained fear. If *People v. Garrett, supra*, 30 Cal.App.4th 962, controls, the jury should have been instructed that the evidence could be considered to show both specific intent and sustained fear. Appellant's assertion that he was denied effective assistance of counsel because his attorney did not object to the CALJIC 2.50 instruction on the ground that it was too narrow is pure sophistry. The instruction favored the defense.

³ The CALJIC 2.50 instruction stated: "Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. [¶] Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: [¶] The existence of the specific intent which is a necessary element of the crime charged[.] [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose."

Appellant argues that the trial court should have limited the prior crimes evidence to the criminal threats counts. He speculates that the jury may have used the evidence to convict on the ADW charge. We reject the argument because the jury was instructed that the prior crimes evidence could only be considered to show "specific intent." (CALJIC 2.50.) The trial court instructed that the ADW was a general intent crime (CALJIC 3.30) and that the other counts required specific intent. (CALJIC 3.31 & CALJIC 2.02.) It is presumed that the jury understood and followed the instructions. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Counsel's failure to object to the CALJIC 2.50 instruction or request for an amplifying instruction did not prejudice appellant. (*People v. Mendoza* (2000) 24 Cal.4th 130, 163.)

Five-Year Enhancement

Appellant contends, and the Attorney General agrees, that one of the five-year enhancements should be stricken. The trial court found that appellant had suffered three felony convictions within the meaning of section 667, subdivision (a): a 1990 arson conviction in case number CR26450; and a 1998 ADW conviction and terrorist threats conviction in case number CR39495.

Section 667, subdivision (a)(1) states in pertinent part that appellant "shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately." The requirement "that the predicate charges must have been 'brought and tried separately' demands that the underlying proceedings must have been formally distinct, from filing to adjudication of guilt." (*In re Harris* (1989) 49 Cal.3d 131, 136.)

The 1998 ADW and terrorist threats convictions arose from the same criminal proceeding and are based on the same case number, i.e., case number CR39495. Section 667, subdivision (a)(1) only permits the imposition of one, five-year enhancement. (*People v. Wiley* (1995) 9 Cal.4th 580, 585.) The 1990 arson conviction (case number CR26450) counts as a second 5-year enhancement.

We modify the judgment to reflect that only two 5-year enhancements were imposed pursuant to section 667, subdivision (a)(1), and to reflect that appellant's total

aggregate sentence is 36 years to life. The superior court is directed to correct the abstract of judgment and forward the corrected abstract to the Department of Corrections. The judgment, as modified, is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Edward F. Brodie, Judge

Superior Court County of Ventura

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